

**IN THE SUPREME COURT
OF MISSOURI**

DAVID G. DePRIEST,)	
Appellant,)	
)	
vs.)	Case No. SC95483
)	
STATE OF MISSOURI,)	
Respondent.)	

**APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE ST. FRANCOIS COUNTY CIRCUIT COURT
THE HONORABLE KENNETH W. PRATTE,
JUDGE AT GUILTY-PLEA AND POST-CONVICTION PROCEEDINGS**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant David G. DePriest restates and incorporates by reference his Jurisdictional Statement filed with the Substitute Statement, Brief, and Argument filed in this Court on March 17, 2016.

* * * * *

Sources will be cited as follows: legal file – “L.F.”; and the transcript of the preliminary hearing and suppression hearings held on May 7, 2012 – “2Supp.Tr.”

STATEMENT OF FACTS

Appellant restates and incorporates by reference his Statement of Facts filed with the Substitute Brief and Argument filed in this Court on March 17, 2016.

POINT RELIED ON

I.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law¹ in that plea counsel failed to object to the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness. Had counsel not agreed to the group guilty-plea procedure, David would not have had to plead guilty when his sister did. If David's hearing had not been held at the same time as his sister's, he would not have been under the same pressure to plead guilty. Therefore, but for plea counsel's ineffectiveness, David would not have pleaded guilty, but would have proceeded to trial instead.

David DePriest v. State, No. SC95483 (Mo. 2016);

¹ These rights are guaranteed by the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§ 10 and 18(a).

Wright v. State, 411 S.W.3d 381 (Mo. banc 2013);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. 1, § 10;

Mo. Const., Art. 1, § 18; and

Mo. Sup. Ct. Rule 24.035.

II.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law² in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David in that he also represented David's co-defendant, his sister, Ms. Natalie DePriest.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

David DePriest v. State, No. SC95483 (Mo. 2016);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. 1, § 10;

Mo. Const., Art. 1, § 18; and

Mo. Sup. Ct. Rule 24.035.

² See n.2.

III.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law³ in that plea counsel failed to advise David that – if a preliminary hearing were held or the defense filed a notice to have a suppression motion heard – the state's offer would be withdrawn.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because he would have accepted the state's ten- (10-) year offer. Instead, he had to plead guilty without an offer and was sentenced to twenty-two (22) years' imprisonment.

David DePriest v. State, No. SC95483 (Mo. 2016);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. 1, § 10;

Mo. Const., Art. 1, § 18;

³ See n.2.

Mo. Sup. Ct. Rule 24.035; and

Mo. Rev. Stat. §559.115 (Cum. Supp. 2010).

V.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law⁴ in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David because plea counsel used the charges against David to “speak about marijuana legalization” and use David as a “martyr” to legalize marijuana in Missouri.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

David DePriest v. State, No. SC95483 (Mo. 2016);

U.S. Const., Amend. V;

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Const., Art. I, §18;

⁴ See n.2.

Mo. Sup. Ct. Rule 24.035; and

Growing Pot Got These Siblings as Much Time as Driving Drunk and

Killing Someone, The Huffington Post (April 15, 2014).

VI.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his right to due process of law⁵ in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum sentences consecutively for the offenses to which David had pleaded guilty.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by the prosecutor's vindictiveness toward plea counsel. Because of it, the prosecutor's sole purpose in asking for the harshest sentencing disposition was to penalize David for exercising his right to hire counsel of his choice. There was a reasonable probability that – had the state not asked for the maximum sentences running consecutively – the court would not have sentenced David to the maximum and ordered two sentences to run consecutively.

David DePriest v. State, No. SC95483 (Mo. 2016);

U.S. Const., Amend. V;

⁵ These rights are guaranteed by the United States Constitution, Fifth and Fourteenth Amendments and the Missouri Constitution, Article I, §10.

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

Mo. Sup. Ct. Rule 24.035;

Growing Pot Got These Siblings as Much Time as Driving Drunk and

Killing Someone, The Huffington Post (April 15, 2014); and

The Prosecutor Discusses the State's Position, The Farmington Daily

Journal (November 14, 2013).

ARGUMENT

I.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law⁶ in that plea counsel failed to object to the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness. Had counsel not agreed to the group guilty-plea procedure, David would not have had to plead guilty when his sister did. If David's hearing had not been held at the same time as his sister's, he would not have been under the same pressure to plead guilty. Therefore, but for plea counsel's ineffectiveness, David would not have pleaded guilty, but would have proceeded to trial instead.

In its Brief, the Respondent was incorrect in arguing that it was reasonable for counsel to proceed with the group guilty plea because David had not objected. Brief for Respondent at 29, David DePriest v. State, No. SC95483 (Mo.

⁶ See n.2.

2016)[hereinafter, Brief for Respondent]. The Respondent was incorrect because it was for counsel, the legal expert, to object.

Only counsel could have known the coercive effect of the group guilty plea. David, who had never pleaded guilty to a felony before, could not be expected to know what was coming. He could not have been expected to know that, because he was pleading in a group, he would need to stand next to his sister, knowing that she could not get the benefit of her bargain with the state unless he pleaded guilty without one. Therefore, counsel cannot be excused from objecting to the group guilty plea proceeding.

The Respondent was also incorrect because David would have had no reason to know appellate courts disapprove of the group guilty plea procedure. David did not know that this Court has previously decided, “[W]e have stated repeatedly that it should be discontinued.” Wright v. State, 411 S.W.3d 381, 387 (Mo. banc 2013). But counsel would be familiar with that. Therefore, counsel cannot be excused from objecting to the group guilty plea proceeding. Thus, the Respondent was incorrect in arguing that it was reasonable for counsel to proceed with the group guilty plea because David had not objected.

The Respondent was also incorrect in arguing that David did not allege that the group guilty plea hearing increased the coercion against him to plead guilty. David did allege that the coercion was increased because he had to plead guilty at the same time his sister did (L.F. 103). That could only occur in a group guilty plea hearing. Therefore, the Respondent was incorrect in arguing that David had

not alleged that the group guilty plea hearing increased the coercion against him.

For the reasons cited above, the motion court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because plea counsel failed to object to the court's hearing David's guilty pleas at the same time as six other defendants', including his sister Natalie's. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

II.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law⁷ in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David in that he also represented David's co-defendant, his sister, Ms. Natalie DePriest.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

The Respondent was correct in pointing out that counsel's representing both David and Natalie DePriest was not enough to cause a conflict of interest. Brief for Respondent at 34. But that was only one of several factors causing the conflict.

In addition to counsel's representing both David and Natalie DePriest, the conflict was caused by the following factors: 1) David and Natalie were co-defendants; 2) they are brother and sister; 4) they had much different levels of

⁷ See n.2.

culpability because the marijuana they were accused of cultivating and possessing had been found primarily in David's bedroom; and 5) Natalie could only receive the benefit of a plea agreement with the state if David pleaded guilty without one. Brief for Appellant at 15. Therefore, the Respondent was incorrect in arguing that counsel's representing both David and Natalie was not a conflict of interest.

For the reasons cited above, the motion court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because David was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law in that plea counsel failed to withdraw from representing David. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

III.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law⁸ in that plea counsel failed to advise David that – if a preliminary hearing were held or the defense filed a notice to have a suppression motion heard – the state's offer would be withdrawn.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by counsel's ineffectiveness because he would have accepted the state's ten- (10-) year offer. Instead, he had to plead guilty without an offer and was sentenced to twenty-two (22) years' imprisonment.

The Respondent was incorrect in arguing that the motion court's decision to deny post-conviction relief should be affirmed in this point because David did not protest when he heard at the preliminary hearing that the state had withdrawn its offer. Brief for Respondent at 57-58.

The Respondent did not consider David's stating in his amended motion he was aware the state had been willing to recommend the court retain jurisdiction

⁸ See n.2.

under § 559.115 (L.F. 87). Because of that, he did not protest when the state announced at the preliminary hearing

Your Honor, before I proceed, I would like one thing noted for the record. On both of these cases, the State did extend a plea offer, which would have, which would have entailed pleading to two counts. Pursuant to 559.115, that has been rejected by both the Defendants in this case. I just want it noted for the record that that was a plea offer extended, that they're fully aware of what's going on (2Supp.Tr. 2-3).

But David was not fully aware of what was going on. He did not know that the state's offer would be withdrawn if 1) a preliminary hearing were conducted; 2) the case were set for trial; 3) the defense gave notice to hear any pre-trial motions; or 4) the defense deposed witnesses (L.F. 87-88). Because the prosecutor did not include that information in his announcement at the preliminary hearing, David would not have known to protest. Therefore, the motion court clearly erred in using David's not protesting to deny post-conviction relief. Thus, Respondent was incorrect.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because plea counsel failed to advise David that – if a preliminary hearing were held or the

defense filed a notice to have suppression motions heard – the state’s initial offer would be withdrawn. David’s rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals’ decision.

V.

The motion court clearly erred in denying Appellant David DePriest’s Rule 24.035 motion for post-conviction relief because he was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law⁹ in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David because plea counsel used the charges against David to “speak about marijuana legalization” and use David as a “martyr” to legalize marijuana in Missouri.

The court denied David’s Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

Because of the actual conflict of interest between David and counsel, prejudice is presumed.

The Respondent asks this Court to affirm the motion court’s deciding that plea counsel was not trying to make a martyr of David. Brief for Respondent at 52. But after David’s sentencing, Respondent told a reporter that plea counsel “just wanted a platform to speak about marijuana legalization and to use [David and Natalie] as martyrs.” *Growing Pot Got These Siblings as Much Time as*

⁹ See n.2.

Driving Drunk and Killing Someone, The Huffington Post (April 15, 2014)(material in brackets added). The Respondent should not be able to speak something publicly as a representative of the State of Missouri at one court level and hold the opposite position before this Court. Thus, the Respondent should not be able to make this argument.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because David was denied his rights to conflict-free counsel, effective assistance of counsel, and due process of law in that plea counsel failed to withdraw from representing David because counsel had an actual conflict of interest in representing David because plea counsel used the charges against David to "speak about marijuana legalization" and use David as a "martyr" to legalize marijuana in Missouri. David's rights under the United States Constitution, Fifth, Sixth, and Fourteenth Amendments, and the Missouri Constitution, Article I, §§10 and 18(a) were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

VI.

The motion court clearly erred in denying Appellant David DePriest's Rule 24.035 motion for post-conviction relief because he was denied his right to due process of law¹⁰ in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum sentences consecutively for the offenses to which David had pleaded guilty.

The court denied David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing although he alleged facts, not conclusions, which if proven would entitle him to relief, and the facts he alleged raised matters not conclusively refuted by the files and records.

David was prejudiced by the prosecutor's vindictiveness toward plea counsel. Because of it, the prosecutor's sole purpose in asking for the harshest sentencing disposition was to penalize David for exercising his right to hire counsel of his choice. There was a reasonable probability that – had the state not asked for the maximum sentences running consecutively – the court would not have sentenced David to the maximum and ordered two sentences to run consecutively.

The Respondent was incorrect in arguing that David did not allege that the prosecutor disliked plea counsel, or that he blamed plea counsel for David's rejecting the state's plea offer. Brief for Respondent at 69.

¹⁰ See n.6.

In the amended motion, David did allege that the prosecutor disliked plea counsel and blamed plea counsel for the state's offers being rejected. In the motion, David alleged the prosecutor disliked plea counsel (L.F. 79). He also alleged that the prosecutor blamed plea counsel for rejecting the state's offer. David quoted the prosecutor himself: "I made Viets an offer . . . and he refused" (L.F. 78). *Growing Pot Got These Siblings as Much Time as Driving Drunk and Killing Someone*, The Huffington Post (April 15, 2014). David also quoted the prosecutor saying that plea counsel had "turned down all plea offers." *The Prosecutor Discusses the State's Position*, The Farmington Daily Journal (November 14, 2013). Therefore, Respondent was incorrect in arguing that David had not alleged that the prosecutor disliked plea counsel and blamed him for David's rejecting the plea offer.

The Respondent was also incorrect in arguing that the prosecutor – after advising plea counsel that he would make David no further plea offer – "soften[ed] somewhat and renewed plea negotiations." Brief for Respondent at 69-70 (material in brackets added). Respondent was referring to the prosecutor's May 18, 2013 letter to plea counsel (L.F. 128).

The Respondent was incorrect in basing its argument on that letter because it did not establish that the prosecutor had softened his position. In that same letter, the prosecutor stated, "I am not inclined to make any further offers" (L.F. 128).

The Respondent was also incorrect in relying on that letter because, a little

more than a month after sending it, the prosecutor continued to advise plea counsel he would not make David any plea offers. On June 27, 2013, the prosecutor told plea counsel that he would only agree to dismiss Natalie's passing-bad-check charges if David pleaded guilty (L.F. 120). Therefore, the prosecutor did not soften his position. Thus, the prosecutor was incorrect.

For the reasons cited above, the court clearly erred in denying David's Rule 24.035 motion for post-conviction relief without an evidentiary hearing because David was denied due process of law in that the prosecutor penalized David for exercising his right to counsel of his choice by asking the court to impose the maximum terms of imprisonment consecutively. David's rights under the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, §10 were thus violated. David therefore requests this Court affirm the Missouri Court of Appeals' decision.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I-VII, Appellant David G. DePriest requests this Honorable Court affirm the Missouri Court of Appeals' decision in David G. DePriest v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under Missouri Supreme Court Rules 83.08(c) and 84.06(g), I hereby certify that on this 2nd day of May, 2016, a copy of this Substitute Reply Brief was served via the Court's electronic filing system to Assistant Attorney General Shaun Mackelprang, Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102 at shaun.mackelprang@ago.mo.gov.

/s/ Lisa M. Stroup
Lisa M. Stroup

CERTIFICATE OF COMPLIANCE

Under Mo. Sup. Ct. Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of 7,750 words for a Substitute **Reply Brief** in this Court. The word-processing software identified that this brief contains 4,578 words and 469 lines. It is in text-searchable PDF form.

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